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No. 08-___

IN THE
Supreme Court of the United States

REPUBLIC OF IRAQ, et al.,
Petitioners,
v.

ROBERT SIMON, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Republic of Iraq possesses sovereign immunity from the jurisdiction of the courts of the United States in cases involving alleged misdeeds of the Saddam Hussein regime predicated on the now-repealed state sponsor of terrorism subject matter exception to immunity of former 28 U.S.C. § 1605(a)(7).

PARTIES TO THE PROCEEDINGS

Petitioners are the Republic of Iraq and Jalal Talibani in his official capacity as President of Iraq. Pursuant to S. Ct. R. 35.3, President Talibani has been substituted for Saddam Hussein, who was named as a defendant below but is now deceased. The Iraqi Intelligence Service ("IIS") was also a named defendant, but it has since been dissolved. *See* Coalition Provisional Authority Order No. 2 (May 23, 2003) (available at www.iraqcoalition.org/regulations/20030823_CPAORD_2_Dissolution_of_Entities_with_Annex_A.pdf). To the extent the former IIS nevertheless remains a party, this petition is filed on its behalf as well.

Respondents were the plaintiffs/appellants below: Robert Simon, Francoise Simon, Robert Alvarez, Roberto Alvarez, Islamic Society of Wichita (substituted for Nabil Seyam), Ahmad Seyam, Yusef Seyam, Melissa Seyam, and Carrie Seyam.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Republic of Iraq et al. ("Iraq") respectfully petition this Court for a writ of certiorari to review the judgment in this case.

OPINIONS BELOW

The opinion of the D.C. Circuit is reported at ___ F.3d ___ and is reproduced at page 1a of the appendix to this petition ("App."). The opinion of the District Court is reported at __ F. Supp. 2d __ and reproduced at App. 23a.

JURISDICTION

The judgment of the D.C. Circuit was entered on June 24, 2008. App. 23a. On September 12, 2008, the Chief Justice extended the time for filing this petition to October 22, 2008. App. 56a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The text of the relevant statutes is set forth in the appendix to this petition. App. 58a.

INTRODUCTION

This petition is sister to the petition pending before this Court in *Republic of Iraq v. Beaty*, No. 07-1080. Both seek review of decisions of the United States Court of Appeals for the District of Columbia Circuit that gravely impact the national security interests of the United States in Iraq. In the event the Court does not consider the issues in *Beaty* alone, the twin petitions should be considered jointly. If the Court rules in *Beaty* that either the President's national security waiver under the Emergency Wartime Supplemental Appropriations Act of 2003

or the enactment of the National Defense Authorization Act for Fiscal Year 2008 ("NDAA") and waiver issued under that statute terminated all pending lawsuits against the Republic of Iraq for lack of subject matter jurisdiction, that ruling would be dispositive of the issue raised by this petition. Alternatively, these issues could be considered jointly in both cases

STATEMENT OF THE CASE

1. **The Complaints.** According to the complaints, plaintiffs Robert Simon, Roberto Alvarez, and Nabil Seyam (now deceased) were taken prisoner by the former Iraqi regime during the First Gulf War. Mr. Simon and Mr. Alvarez were detained in 1990 and were released six weeks later. First Amended Complaint ¶¶ 23, 37, *Simon* v. *Rep. of Iraq*. Mr. Seyam was detained in 1991 and released eighteen days later. Second Amended Complaint ¶¶ 9, 15, *Seyam* v. *Iraq*.

At that time, Iraq possessed absolute sovereign immunity from such claims. But in 1996, Congress amended the Foreign Sovereign Immunities Act ("FSIA") to add 28 U.S.C. § 1605(a)(7) ("former Section 1605(a)(7)"). That statute deprived countries designated as state sponsors of terrorism (which then included Iraq) of immunity for certain claims that might arise under state law. In 2003—more than 12 years after the underlying events and nearly seven years after the enactment of Section 1605(a)(7)—these plaintiffs and family members filed suit against Iraq under that provision seeking more than $243 million in compensatory and

punitive damages as a result of alleged mistreatment by forces of the prior regime.[1]

2. **The EWSAA.** Shortly after a U.S.-led coalition deposed the Saddam Hussein regime, Congress enacted the Emergency Wartime Supplemental Appropriations Act of 2003 ("EWSAA"), Section 1503 of which gave the President the authority to "make inapplicable with respect to Iraq" a specific sanctions law as well as "any other provision of law that applies to countries that have supported terrorism." Pub. L. No. 108-11, § 1503, 117 Stat. 559, 579 (2003).

In May 2003, President Bush issued Presidential Determination No. 2003-23, which lifted various sanctions against Iraq and expressly exercised his EWSAA authority to make inapplicable with respect to Iraq "*any* * * * provision of law" applying to countries that have supported terrorism. 68 Fed. Reg. 26,459 (May 7, 2003) (emphasis added). The President confirmed to Congress that this included rendering inapplicable with respect to Iraq former Section 1605(a)(7), which was the asserted and only conceivable basis for subject matter jurisdiction in this case. *Message to the Congress*, 39 Weekly Comp. Pres. Doc. 647, 647-48 (May 22, 2003).

That determination should have rendered Iraq once again immune from the jurisdiction of the courts of the United States in this and similar cases, just as Iraq was immune when the acts at issue were

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[1] In May 2005, the trial judge consolidated the *Simon* and *Seyam* cases with another similar case on his docket, *Vine* v. *Republic of Iraq*, No. 01-CV-2674, which remains pending in the District Court.

allegedly committed. Pursuant to 28 U.S.C. § 1330(a), federal subject matter jurisdiction over foreign sovereigns exists only if "the foreign state is not entitled to immunity either under sections 1605–1607 of this title or under any applicable international agreement." Because Section 1605(a)(7) was the only exception to sovereign immunity asserted to be applicable to Iraq in this case, and because the President made that statute inapplicable pursuant to authority granted by Congress, there was no longer any basis for subject matter jurisdiction. Federal courts must dismiss cases, sua sponte or otherwise, whenever subject matter jurisdiction lapses or is withdrawn. See *Ex Parte McCardle*, 74 U.S. 506 (Wall.) (1868).

Invoking the authority of the International Emergency Economic Powers Act, as amended (50 U.S.C. 1601 et seq.), on May 22, 2003, the President issued Executive Order 13,303, in which he declared that the threat of judicial process against Iraqi assets "obstructs the orderly reconstruction of Iraq, the restoration and maintenance of peace and security in the country, and the development of political, administrative, and economic institutions in Iraq." 68 Fed. Reg. 31,931 (May 22, 2003). The President declared that "[t]his situation constitutes an unusual and extraordinary threat to the national security and foreign policy of the United States[.]" *Id.*

The Order prohibited attachments against numerous Iraqi assets. And the President further declared that it is "[a] major national security and foreign policy goal of the United States" to ensure that all "Iraqi resources"—not merely those that

were the main subject of the Executive Order—are dedicated to reconstruction of Iraq and "other purposes benefiting the people of Iraq." 39 Weekly Comp. Pres. Doc. at 647. He explained that he had taken certain actions—specifically including making Section 1605(a)(7) inapplicable to Iraq—to protect Iraqi property from judicial process, which "jeopardiz[ed] the full dedication of such assets to purposes benefiting the people of Iraq." *Id.* at 647-48. Thus, given that Section 1605(a)(7) was the only potential basis for subject matter jurisdiction in this case, the President confirmed that this case, and others like it, pose the threat to national security and foreign policy that he had identified.

Thereafter, in August 2003, the United States filed a Statement of Interest in the *Vine* case (which was later consolidated with these cases) urging dismissal for lack of subject matter jurisdiction on the ground that the President's EWSAA Determination had validly restored Iraq's sovereign immunity.

3. **Acree.** On June 4, 2004, the D.C. Circuit decided *Acree* v. *Republic of Iraq*, 370 F.3d 41 (D.C. Cir. 2004). Although Iraq was also the named defendant in that case, *Acree* involved different plaintiffs and different claims from the present case, and Iraq did not appear in *Acree* either in the District Court or the D.C. Circuit. Instead, the United States intervened to appeal a $959 million default judgment that had been entered against Iraq, arguing that the President's determination to render Section 1605(a)(7) of the FSIA inapplicable to Iraq—and thus restore Iraq's sovereign immunity—was a valid exercise of his EWSAA authority.

A panel of the D.C. Circuit rejected that argument. Even though Section 1503 of the EWSAA expressly authorized the President to make inapplicable with respect to Iraq "*any* * * * provision of law that applies to countries that have supported terrorism," (emphasis added), and even though Section 1605(a)(7) was a provision of law that applied *only* to countries that have supported terrorism, the panel interpreted Section 1503 narrowly to include only "legal restrictions on assistance and funding for the new Iraqi Government." *Acree*, 370 F.3d at 57.

But even the majority found that this was an "exceedingly close question," *id.* at 51, and its conclusion was disputed by then-Judge Roberts. As he explained, the EWSAA language "'[a]ny other provision' should be read to mean 'any other provision,' not, as the majority would have it, 'provisions that present obstacles to assistance and funding for the new Iraqi government.'" *Id.* at 60 (citation omitted).

The panel nevertheless vacated the entire judgment against Iraq on other grounds. Because the judgment was vacated, there was no opportunity for the United States to seek *en banc* or Supreme Court review of the panel majority's subject matter jurisdictional holding on the EWSAA issue.

The issue returned to the D.C. Circuit in the *Beaty* case, which is now pending on a petition for certiorari in this Court. In *Beaty*, Iraq filed a petition for initial hearing *en banc*, urging the D.C. Circuit to reconsider and overrule *Acree*. The United States filed an amicus brief urging that the petition for initial *en banc* review be granted. The

Court of Appeals denied the petition for initial hearing *en banc*, although Judges Kavanaugh and Brown, however, dissented from that order. See Order, *Rep. of Iraq v. Beaty*, No. 07-7057 (D.C.Cir. Nov. 6, 2007). The D.C. Circuit then summarily rejected Iraq's position on the merits, relying on *Acree*, and Iraq has petitioned this Court for review of that decision in No. 07-1090.

4. **Proceedings In The District Court.** On July 20, 2004, before Iraq moved to dismiss the complaints in these cases, the trial judge held, in the related *Vine* case, that *Acree* was binding on the question of whether the President's EWSAA determination had restored Iraq's sovereign immunity. *See* Memorandum and Order, *Vine* v. *Republic of Iraq*, No. 01-CV-2674 (D.D.C. July 20, 2004).

On September 6, 2006, after it had consolidated the *Simon*, *Seyam*, and *Vine* cases, the District Court concluded that it possessed subject matter jurisdiction under former Section 1605(a)(7), but dismissed Respondents' cases as outside the statute of limitations. App. 38a-48a.[2]

5. **The NDAA.** Plaintiffs appealed the dismissal of their claims to the D.C. Circuit, which heard argument in October 2007. Prior to a decision, however, Congress enacted Section 1083 of the

[2]The court dismissed the claims of the *Simon* and *Seyam* plaintiffs as barred by the 10-year statute of limitations because plaintiffs' causes of action had accrued by December 1990 at the latest, but plaintiffs waited more than twelve years to file suit. App. 38a-48a. The court rejected the plaintiffs' contentions that the expiration of the statute of limitations should be excused because Iraq was immune from suit for part of that period, from December 1990 until the enactment of former Section 1605(a)(7) in April 1996.

National Defense Authorization Act for Fiscal Year 2008 ("NDAA"), which repealed the subject matter jurisdiction over plaintiffs' claims.

On December 14, 2007, Congress passed the initial version of the NDAA, whose main purpose was to authorize funding for the military. Section 1083 of that bill, however, contained new jurisdictional, liability, and other provisions for litigation against current and former state sponsors of terrorism.

Section 1083 had originally been introduced as an amendment on the Senate floor, and there were no hearings or substantive debates on it. In particular, Section 1083(c)(4) was an entirely new provision inserted in conference committee with no debate or even identification of its sponsor. *Compare* H.R. Rep. No. 110-477, at 338-344 (2007) *with* 153 Cong. Rec. S12631-32 (daily ed. Oct. 3, 2007).

On December 28, 2007, the President vetoed the entire NDAA solely because of Section 1083's application to litigation against Iraq. The President explained that Section 1083, if allowed to become law, "would undermine the foreign policy and commercial interests of the United States." *Memorandum of Disapproval*, 3 Weekly Comp. Pres. Doc. 1641 (Dec. 28, 2007).

Following the veto, Congress swiftly reenacted a new NDAA. Section 1083 expressly repealed former 28 U.S.C. § 1605(a)(7), the statute invoked as the basis for subject matter jurisdiction in this and other cases against Iraq. *See* NDAA, § 1083(b)(1)(A)(iii) ("Section 1605 of title 28, United States Code, is amended * * * in subsection (a) * * * by striking paragraph (7)"). In its place, Congress enacted a

new subject matter jurisdiction exception to immunity for state sponsors of terrorism, now codified at 28 U.S.C. § 1605A(a)(1) ("Section 1605A(a)(1)"). *See* NDAA, § 1083(a). Repeal of Section 1605 (a)(7), ipso facto, defeated subject matter jurisdiction in federal courts over all cases pending against Iraq.

Insofar as it provides a new basis for subject matter jurisdiction, Section 1605A(a)(1) is largely consonant with former Section 1605(a)(7). Any complaint that invoked subject matter jurisdiction under the repealed statute could theoretically be re-filed under the new statute. The reenacted version of the NDAA, however, contained a new provision, Section 1083(d)(1), which authorized the President to "waive any provision of [Section 1083] with respect to Iraq, insofar as that provision may, in the President's determination, affect Iraq or any agency or instrumentality thereof."

In order to issue such a waiver, the President must determine that a waiver is "in the national security interest of the United States" and would "promote the reconstruction of, the consolidation of democracy in, and the relations of the United States with, Iraq," and that "Iraq continues to be a reliable ally of the United States and partner in combating acts of international terrorism." NDAA, § 1083(d)(1). Congress provided that the waiver will apply to pre-enactment conduct and regardless of the extent to which it affects pending cases. *Id.* § 1083(d)(2). Section 1083(d)(4) also states the "sense of Congress" that the President "should work with the Government of Iraq on a state-to-state basis to ensure compensation for any meritorious claims

based on terrorist acts committed by the Saddam Hussein regime" that "cannot be addressed in courts in the United States due to the exercise of the waiver authority under paragraph (1)." *Id.* § 1083(d)(4).

On January 28, 2008, the President exercised his authority to waive "all provisions of section 1083 of the Act with respect to Iraq and any agency or instrumentality thereof." Presidential Determination No. 2008-9, 73 Fed. Reg. 6571 (Feb. 5, 2008). This waiver necessarily included the entirety of 28 U.S.C. § 1605A, which was added by Section 1083(a).

The President made all of the determinations required by Section 1083(d)(1). He also determined that Section 1083 may adversely affect Iraq "by exposing Iraq or its agencies or instrumentalities to liability in United States courts and by entangling their assets in litigation." *Id.* The President concluded that "[s]uch burdens would undermine the national security and foreign policy interests of the United States." *Id.* at 6573.

These burdens, in the President's view, included "a potentially devastating impact on Iraq's ability to use Iraqi funds to expand and equip the Iraqi Security Forces, which would have serious implications for U.S. troops in the field acting as part of the Multinational Force-Iraq and would harm anti-terrorism and counter-insurgency efforts." *Id.* at 6574. The President also determined that applying Section 1083 to Iraq "will hurt the interests of the United States by unacceptably interfering with political and economic progress in Iraq that is critically important to bringing U.S. troops home," and "would redirect financial resources from the continued reconstruction of Iraq and would harm

Iraq's stability, contrary to the interests of the United States." *Id.* at 6574-75. He further stated that "[t]he economic security and successful reconstruction of Iraq continue to be top national security priorities of the United States" and that Section 1083 "threatens those key priorities." *Id.* at 6571.

6. **The D.C. Circuit's Decision.** Following the President's waiver, the D.C. Circuit *sua sponte* directed the parties to submit simultaneous briefs of no more than 15 pages, addressing the effect, if any, of the NDAA and the waiver on this case, specifically including "whether pending cases filed under former 28 U.S.C. § 1605(a)(7) may proceed on the basis of that provision." Order, *Simon* v. *Republic of Iraq*, Nos. 06-7175, 06-7178 (D.C. Cir. Feb. 4, 2008).

In its brief, Iraq contended that the NDAA and waiver confirmed the lack of subject matter jurisdiction in this case because the NDAA (1) repealed the jurisdictional basis for these cases—former Section 1605(a)(7)—and (2) replaced it with a new jurisdictional provision—28 U.S.C. § 1605A(a)(1)—which the President waived as to Iraq pursuant to express statutory authority.[3] The court allowed no responsive briefing, and held no argument on this issue.

On June 24, 2008, a three-judge panel of the United States Court of Appeals for the District of

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[3] Despite *Acree*, Iraq had previously urged to the D.C. Circuit in this case that the EWSAA presidential waiver terminated subject matter jurisdiction over respondent's claims. *See* Brief of Appellee at 51-53 (D.C.Cir. filedJune 18, 2007. Iraq reiterated that position in its supplemental brief . *See* Brief of Appellee Republic of Iraq in Response to Court's Order of Feb. 4, 2008 at 7 n.3 (D.C.Cir filed March 14, 2008).

Columbia Circuit concluded that the President's waiver under the NDAA did not disturb pending section 1605(a)(7) litigation involving potentially crippling damages liability against Iraq. The court relied on statutory opacity to infer that Congress intended to apply the repeal of subject matter jurisdiction under Section 1605(a)(7) only prospectively, a highly unusual legislative practice. The panel recognized that its ruling was fraught with great foreign policy consequences: "Cognizant of the President's concerns and of the potential implications of our holding upon the foreign affairs of the United States, we do not lightly conclude that the NDAA leaves intact our jurisdiction over cases, such as these, that were pending against Iraq when Congress enacted the NDAA." App. 62a.

On September 12, 2008, the Chief Justice extended the time for filing this petition. App. 56a.

REASONS FOR GRANTING THE WRIT

This case easily satisfies the criteria for this Court's review. It implicates issues of national and international importance of the highest order that were wrongly decided below. At stake in this case is whether the Republic of Iraq's economic, military, and political reconstruction will be crippled by lawsuits born of Saddam Hussein's terrorism asserting damages liability exceeding $1 billion in United States courts. But equally important, this case threatens to undermine the reciprocity of sovereign immunity between the Republic of Iraq and the United States of America in the respective national courts, evidenced in this and the other Saddam-era terrorism cases brought under the jurisdictional provisions of 28 U.S.C. § 1605(a)(7).

This lack of reciprocity hurts the interests of the United States by unacceptably interfering with political progress in Iraq critically important to bringing U.S. troops home and further harms Iraq's stability, contrary to the interests of the United States, by impeding the ability of the United States and Iraq to conclude a Memorandum of Understanding (MOU) or Status of Forces Agreement (SOFA) governing United States combat troops and contractors in Iraq by December 31, 2008. Without an MOU or SOFA after 2008, United States national security interests in Iraq may be wounded or worse. The time has come for this nation's highest Court to resolve these important issues inflaming relations with a critically important ally of the United States.

I. THIS CASE INVOLVES ISSUES OF EXCEPTIONAL NATIONAL AND INTERNATIONAL IMPORTANCE.

A. The D.C. Circuit's Decision Could Impair Negotiations Between The United States And Iraq Over Terms And Conditions For Extending The United States Military Combat Presence In Iraq.

The decision below compromises the United States war against terror in Iraq; and, confounds the ambition of the United States to conclude either an MOU or SOFA with Petitioner over sovereign immunity issues or otherwise. According to The New Times Senator Carl Levin, chairman of the Senate Armed Services Committee, has warned: "It's critical that our dedicated men and women in uniform in Iraq have full legal protections and are not subject to criminal prosecution in an Iraqi

judicial system that does not meet due process standards." Thom Shanker and Steven Lee Myers, "Draft of Iraq Deal Sets U.S. Pullout by End of 2011, With Some Flexibility," *New York Times*, 18 October 2008, Sec. A, col. 1, p.5. Senator Levin's sentiments have been echoed by Representative Ike Skelton of the House Armed Services Committee: "I am very concerned about reports that U.S. service personnel may not have full immunity under Iraqi law." Mary Beth Sheridan and Karen DeYoung, "U.S., Iraqi Officials Question Terms of Draft Security Deal," *The Washington Post*, 18 October 2008, Sec. a, col. 1, p. 10. On the other hand, *The Washington Post* has reported: "Some political leaders in Baghdad, who got their first look at the controversial agreement to extend the U.S. military presence in Iraq beyond 2008, said it did not go far enough in guaranteeing Iraqi sovereignty." (Id.)

The Iraqi Parliament must approve any MOU or SOFA. But that approval becomes problematic when the United States judiciary does not respect Iraqi sovereignty in a way that corresponds to the immunities the United States enjoys in Iraqi courts. On October 19, 2008, The *New York Times* reported: "Iraqis frequently express mixed emotions, torn between a genuine loathing of being occupied by American troops who have often seemed oblivious to Iraqis' feelings and a recognition of the country's vulnerabilities." Alissa J. Rubin, "Iraqis March In Baghdad To Protest Security Pact," *New York Times*, 19 October 2008, sec. A, col. 1, p. 8. If satisfactory immunity for American forces and contract personnel is not granted in an MOU or SOFA, the consequence would be a pre-mature curtailment of

combat operations in Iraq against undefeated enemies of the United States.

The United States is engaged in an ongoing military operation with the purpose of supporting and strengthening the new democratic government of Iraq and the reconstruction of its country. In the view of both Iraq and the United States, subjecting the sovereign nation of Iraq to lawsuits based on the misdeeds of its prior regime would severely hinder that foreign policy goal and threaten the critical U.S.-Iraqi alliance.

The issue of Iraq's sovereign immunity for the misdeeds of the deposed Saddam Hussein regime potentially impacts at least seven other pending cases against Iraq involving well over $1 billion in asserted liability.[4] Iraq is aware of no other friendly ally of the United States that has ever been subjected to liability in U.S. courts based on the tortious misdeeds of a formerly hostile regime.

This case is also exceptionally important to the United States, as the ruling below has compromised a major U.S. foreign policy goal: U.S. support for the reconstruction of Iraq and its new democratic government.[5] The D.C. Circuit recognized that "the

[4] *See, e.g., Vine* v. *Rep. of Iraq*, No. 01-2674 (D.D.C.) (claims for $400 million); *Acree* v. *Rep. of Iraq*, Nos. 02-632, 06-723 (D.D.C.) (renewed complaint and Rule 60(b) motion seeking to reinstate claims for $959 million); *Lawton* v. *Rep. of Iraq*, No. 02-474 (D.D.C.); *In re Terrorist Attacks on September 11, 2001*, MDL-1570 (S.D.N.Y.) (asserted liability against all defendants of more than $1 trillion); *Beaty v. Rep. of Iraq*, No. 03-215 (D.D.C. claims for more than $2.1 million).

[5] *See, e.g.*, Amy Falls, *Acree* v. *Republic of Iraq: Holding a Fragile, U.S.-Backed Government Civilly Liable for the Wrongdoings of the Previous, Ousted Regime*, 73 Geo. Wash. L.

foreign policy considerations Iraq raises are important, as the President's actions and statements make clear." App. 20a. In issuing his EWSAA determination, the President declared that the threat of judicial process against any Iraqi assets "obstructs the orderly reconstruction of Iraq, the restoration and maintenance of peace and security in the country, and the development of political, administrative, and economic institutions in Iraq" and "constitutes an unusual and extraordinary threat to the national security and foreign policy of the United States[.] 68 Fed. Reg. 31,931 (May 22, 2003). He also made clear that it is "[a] major national security and foreign policy goal of the United States" to ensure that all Iraqi resources are dedicated to reconstruction of Iraq and purposes benefiting the people of Iraq." 39 Weekly Comp. Pres. Doc. at 647.

Indeed, the issue was so important that the United States took the extraordinary step of filing an unsolicited amicus brief in the *Beaty* case in the D.C. Circuit seeking an initial *en banc* review in order to overrule *Acree*. In that brief, the United States stated that the issue of Iraq's sovereign immunity is one of "exceptional and continuing importance." Brief for United States as Amicus Supporting Initial Hearing En Banc ("*Beaty* U.S. Amicus Br.") at 2, *Beaty* v. *Rep. of Iraq*, No. ___ (D.C. Cir. filed July 23, 2007). The United States also has underscored the

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Rev. 880, 893-95 (2005) ("regrettable" decision in *Acree* "lead[s] to truly bizarre and perplexing results, subjecting a country devastated by the U.S. military to potentially billions of dollars of liability in U.S. courts," and thus "directly contradicts current U.S. foreign policy").

importance of that issue in statements of interest filed in the *Beaty* case.[6]

More recently, the President underscored the enormous continuing importance of these issues when he took the extraordinary step of vetoing a massive omnibus defense appropriations bill solely because of the deleterious foreign policy consequences one provision would have had on this and similar lawsuits, and then subsequently waived new Section 1605A as to Iraq. The President determined that "exposing Iraq or its agencies or instrumentalities to liability in United States courts and * * * entangling their assets in litigation" would "undermine the national security and foreign policy interests of the United States," would have "serious implications for U.S. troops in the field," will "hurt the interests of the United States by unacceptably interfering with political and economic progress in Iraq that is critically important to bringing U.S. troops home," would "redirect financial resources from the continued reconstruction of Iraq and would harm Iraq's stability, contrary to the interests of the United States," and would threaten "[t]he economic security and successful reconstruction of Iraq." 73 Fed. Reg. 6571, 6571-74 (Feb. 5, 2008).

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[6] *See* Statement of Interest at 12, 13, 16, *Beaty* v. *Rep. of Iraq*, No. 03-215 (D.D.C. filed Mar. 15, 2004) (EWSAA determination seeks to remove "a serious threat to the crucial foreign policy goal of promptly rebuilding Iraq into a democratic, self-sustaining nation," which would "significantly interfere with the successful establishment of a new, peaceful government," and "stand[s] as an obstacle to achieving the Nation's foreign policy goals").

U.S. foreign policy is thus undermined by the specter of imposing "crushing liability," *Acree*, 370 F.3d at 61 (Roberts, J.), on an allied nation the United States is actively seeking to rebuild and support. But the diplomatic harms go beyond that.[7] Iraq is aware of no other friendly U.S. ally that has ever been subjected to liability in U.S. courts for the alleged misdeeds of a formerly hostile prior regime. Indeed, similar attempts to subject Germany and Japan to lawsuits for their World War II actions have uniformly been rejected.[8] Thus, it is the stated foreign policy of the United States to "preserve plaintiffs' claims * * * pending the establishment of a successor government capable of negotiating the *diplomatic* or other resolution of claims arising from the misdeeds of its predecessor." Statement of Interest at 16 n.9, *Beaty* v. *Rep. of Iraq*, No. 03-215 (D.D.C. filed Mar. 15, 2004) (emphasis added). Claims of this sort between formerly hostile but subsequently allied nations have always been addressed diplomatically rather than through coercive litigation in foreign courts. Iraq should not be treated differently because of the court of appeals' errors.

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[7] *See* Falls, *supra*, at 893 (*Acree* holding "could potentially devastate the already precarious foreign relationship between the United States and Iraq" as "[m]any Iraqis will likely be skeptical of trusting a foreign government that claims to be committed to developing a new and vibrant economy and government in Iraq, yet refuses to forgive that new government and economy from civil liability for the transgressions committed by the previous regime").

[8] *See, e.g.*, *Hwang Geum Joo* v. *Japan*, 413 F.3d 45 (D.C. Cir. 2005); *Princz* v. *Fed. Rep. of Germany*, 26 F.3d 1166 (D.C. Cir. 1994).

In sum, the decision of the court of appeals, if left unreviewed by this Court, could confound or even shipwreck ongoing negotiations and the conclusion of agreements between the United States and Iraq over extending the presence and use of United States military combat troops and auxiliary contract personnel in Iraq past 2008. It seems probable that the current round of negotiations with the Bush administration will culminate in a provisional status of forces Memorandum of Understanding dealing with the immunities of American forces and contractors to the jurisdiction of Iraqi courts. It will probably be followed with a more permanent Status of Forces Agreement or treaty. At present, however, both the MOU and SOFA could be stillborn over the question of the immunity of the United States or its military personnel from the jurisdiction of Iraqi courts. As noted above, Senator Carl Levin, chairman of the Senate Armed Services Committee, and Representative Ike Skelton, of the House Armed Services Committee, have voiced skepticism over anything less than complete United States immunity. The decision below dramatically weakens the hand of the United States in achieving that goal because Iraq would remain fully exposed to huge damage liability awards in United States courts for the misdeeds of Saddam Hussein and his expired regime unless this Court grants certiorari and reverses the judgment below. And if a deal on immunity is not struck between the United States and Iraq soon, the United States combat military mission could be curtailed in Iraq long before victory.

B. The D.C. Circuit's Opinion Threatens To Undermine U.S. Foreign Policy and Reciprocity Between Nations and Impairs Petitioner's Sovereign Dignity Interests.

An effective foreign policy towards Iraq or elsewhere requires that the United States speak with one voice rather than sound like a discordant symphony. As this Court explained in *United States* v. *Curtiss-Wright Export Corporation*, 299 U.S. 304, 319 (1936): "In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as representative of the nation." Unity of design is indispensable to foreign policy success. That is why this Court has repeatedly invalidated state laws that undercut the foreign policy established by the federal government. *See*, e.g., *American Insurance Association* v. *Garamendi*, 539 U.S. 396 (2003); *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363 (2000). And this Court has been loath to find that Congress has handcuffed the President in blocking lawsuits or otherwise taking economic measures as part of a strategy of negotiating agreements with foreign countries. *See Dames & Moore* v. *Regan*, 453 U.S. 654 (1981).

The decision of the court of appeals, however, creates a Janus-faced foreign policy towards Iraq. On the one hand, the President has established a foreign policy that shields Iraq from damages liability in United States courts for the terrorist acts of its detested predecessor to promote its economic and political reconstruction, and thus its capacity to survive without United States military support. On the other hand, the court of appeals' decision has

established a conflicting foreign policy towards Iraq by exposing the new and friendly government to damage suits in the United States for injuries inflicted by a predecessor enemy regime. That liability exposure cripples the ability of Iraq to defend itself and to succeed in its economic and political reconstruction efforts that the President has championed as central to the national security of the United States. If a judicial decision is to cut a gaping wound in the President's strategy for rebuilding Iraq and removing the United States' combat military involvement, it should not be crafted by a subordinate tribunal.

Petitioner's status as an allied nation-state also militates strongly in favor of granting the writ. Article III, section 2 of the Constitution vests this Court with original jurisdiction over cases "affecting ambassadors" and other "public Ministers and Consuls." Its purpose is to honor the dignity interest of foreign governments or their diplomatic agents by insuring them access to the highest court in the land in the event they are embroiled in litigation. The status of the court should be congruent with the status of the litigants and the importance of the issues at stake. The United States surely expects that it will enjoy equal access to the highest courts in Iraq and other foreign jurisdictions when its critical legal interests are at stake. Reciprocity is a keystone of foreign sovereign immunity. *See National City Bank of New York* v. *Republic of China*, 348 U.S. 356 (1955). This Court thus regularly grants review of cases involving foreign states pivoting on the Foreign Sovereign Immunities Act. *See Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S.

428 (1989). Permitting a lower tribunal to override Presidential determinations by authorizing huge damages liability against an allied foreign state without final review by this Court could well be seen by certain observers in Iraq as an affront, thereby inflaming bilateral relations with a critical foreign sovereign ally of the United States.

C. The D.C. Circuit's Decision Threatens to Alienate the Government of Iraq, the Political Parties of Iraq As Well As The People Of Iraq, And Thus Undermine The War Effort.

To prevail militarily against the insurgency or Al Qaeda in Iraq, the United States must win the hearts and minds of the Iraqi people and have the fullest support of the political branches of the Government of Iraq, including the political parties that hold seats in the Iraqi parliament, the National Council of Representatives. However, the decision of the court of appeals – a co-equal branch of the United States Government – threatens to alienate all by saddling the Government of Iraq and ultimately the people of Iraq with financial responsibility for terrorist crimes perpetrated by the detested dictator Saddam Hussein (who simultaneously oppressed the Iraqi people). The Iraqi people have already displayed their animosity towards Saddam by generally applauding his criminal trial, conviction, death sentence and execution. Yet the D.C. Circuit has now held that the principal victims of Saddam's aggression – the people of Iraq – can now be further victimized for those misdeeds in U.S. courts. The court of appeals' decision – and alarming interference with the

President's war tactics –justifies, simpliciter, review by this Court.

The decision below, if left undisturbed, could be exploited by enemies or opponents of the Government of Iraq in an attempt to destabilize or undermine the government. Whether or not they are correct, such enemies and opponents might point to the decision as support for the accusation that the GOI has not succeeded in becoming an equal sovereign to the United States. The detractors could underscore that the GOI has acquiesced, since the turnover of sovereignty from the Coalition Provisional Authority to the new Government of Iraq on 28 June 2004 through the present, in immunity of the United States of America, the U.S. military and U.S. contractors from suit in Iraqi courts by either the Government of Iraq or Iraqi nationals, and even now still accords almost complete immunity to the United States Government, its military and contractors. They could then assail the Government of Iraq for having tolerated and not eliminated the unequal treatment of the Government of Iraq by U.S. courts asserting "State sponsor of terrorism" jurisdiction under 28 U.S.C. 1605(a)(7) over multi-million dollar private-party damage suits against the Republic of Iraq arising from acts of the former Saddam regime. Such an asymmetrical relationship, these harsh critics may insist, is the continuing unacceptable remnant of a military occupier to a sovereign state. This troublesome potential political ramification of the decision below makes review by this Court correspondingly urgent.

D. The Decision Below Undermines The President's Role As The Principal Arbiter of U.S. Foreign Policy.

The decision of the court of appeals interprets the relevant statutes as if they were provisions of the Internal Revenue Code rather than part of a nimble and flexible national security consensus between Congress and the President. Presidential waiver stipulations like those in the EWSAA and NDAA are staples of national security legislation that enable the nation to opt out of a policy stance in light of ever-changing circumstances that earmark international affairs. *See,* e.g., Iran and Libya Sanctions Act of 1996, P.L. 104-172, 110 Stat. 1541, as amended, section 9; Cuban Liberty and Democratic Solidarity Act, 22 U.S.C. § 6082(h). Presidents would regularly veto foreign policy legislation – even with customary national security waiver language – if it was anticipated that the judiciary would shortchange the waiver by giving a crabbed interpretation of its scope, as was done by the court of appeals regarding the EWSAA and NDAA. This Court should grant review of the decision below to avoid disrupting the role of waiver provisions in national security legislation which facilitates enlightened consensus between the President and Congress.

In the field of national security or foreign affairs, legislative delegations of power are given broader latitude in construction than is true in domestic situations. This Court elaborated in *United States* v. *Curtiss-Wright Export Corp.*, supra, at 320:

> "It is quite apparent that if, in the maintenance of international relations,

> embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved."

The decision of the court of appeals slighted that seminal teaching about international relations. It handcuffed the ability of the President to effectuate an economic, military and political reconstruction policy in Iraq by exposing Iraq to potentially crippling damages lawsuits in the United States. This Court should grant review to insure that congressional delegations in foreign affairs are given proper scope.

II. THE D.C. CIRCUIT'S RULING CONFLICTS WITH THIS COURT'S PRECEDENTS.

Review is also warranted because the D.C. Circuit's jurisdictional determinations—whether through the NDAA or the EWSAA waiver are erroneous and conflict with this Court's precedents. The D.C. Circuit's decision rewrites the statutes, undermines U.S. foreign policy, threatens the U.S.-Iraqi alliance, and should not stand unreviewed by this Court.

A. The D.C. Circuit Erroneously Held That A Repealed Statute Confers Jurisdiction Over This Case.

Section 1083 of the NDAA repealed former Section 1605(a)(7) of FSIA—the only asserted or arguable statutory basis for jurisdiction—and replaced it with a new jurisdictional statute—Section 1605A(a)(1)—that the President then waived as to Iraq pursuant to specific Congressional authorization. Accordingly, there is no longer subject matter jurisdiction over this case. "When a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law." *Bruner* v. *United States*, 343 U.S. 112, 116-17 (1952); *see The Assessors* v. *Osbornes*, 76 U.S. 567, 575 (1869) ("Jurisdiction * * * was conferred by an Act of Congress, and when that Act of Congress was repealed the Power to exercise such jurisdiction was withdrawn, and inasmuch as the repealing act contained no savings clause, all pending actions fell, as the jurisdiction depended entirely upon the Act of Congress."); Accord *Ex Parte McCardle*, supra.

Congress knows how to amend subject matter jurisdiction but give the amendment only prospective effect. In 1988, for instance, Congress amended the diversity statute, 28 U.S.C. 1332, to increase the amount in controversy requirement, but made the subject matter change effective only as to actions commenced on or after the 180th day beyond the enactment, P.L. 100-172, 102 Stat. 462. Not a single syllable in the NDAA indicates Congress intended to continue subject matter jurisdiction under Section 1605 (a)(7) for pending cases after it

had been repealed. The reason is self-evident. New section 1605A(a)(1) creates subject matter jurisdiction for every case previously pending under the old statute. Thus, subject to the express authorization of the President to waive the new statute as to Iraq, new Section 1605A(a)(1) provides a jurisdictional basis for *every* then-pending case. Indeed, Congress provided detailed transition rules under which all pending cases can be re-filed under the new Section 1605A either after enactment of the NDAA or, if necessary, after a judgment in the original action dismissing the case for want of subject matter jurisdiction.[9]

The plain language of 28 U.S.C. § 1330 also confirms the lack of jurisdiction. That statute provides that "[t]he District Court shall have original jurisdiction . . . of any nonjury civil action against a foreign state . . . with respect to which the foreign state is not entitled to immunity under

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[9] The D.C. Circuit misinterpreted NDAA § 1083(c)(3) as expressing a clear intent to preserve former Section 1605(a)(7) for pending cases. That section allows for re-filing under Section 1605A within 60 days after enactment of the NDAA or entry of judgment in the original action. That Congress provided for refiling after entry of judgment in the original action does not mean that Section 1605(a)(7) must still apply to those actions. First, if Section 1605(a)(7) were the only basis for jurisdiction, there would still be a judgment of dismissal, after which a plaintiff may re-file. Second, and contrary to the D.C. Circuit's view, there may be cases where former Section 1605(a)(7) was not the only jurisdictional basis, either because an additional exception to sovereign immunity applied or because there were additional non-sovereign parties not subject to the FSIA. Those cases could proceed to judgment under the alternative jurisdictional basis, after which a plaintiff may, if it chooses, re-file under new Section 1605A(a)(1).

sections 1605-1607 of this title." 28 U.S.C. § 1330(a). Thus, to sustain continuing jurisdiction over this case, the Court must find that Iraq comes within an exception to sovereign immunity provided by currently-in-force sections 1605-1607 of Title 28 of the United States Code. Because Section 1605(a)(7) has been repealed and because its replacement, Section 1605A(a)(1), has been waived as to Iraq, there is no applicable exception codified anywhere in 28 U.S.C. §§ 1605-1607 and no jurisdiction under 28 U.S.C. § 1330.

Review of the decision below is warranted to correct a marked misapplication of this Court's canons of construction when subject matter jurisdiction is in question.

B. The D.C. Circuit Erroneously Nullified The President's EWSAA Determination.

The D.C. Circuit's *Acree* decision—adhered to in this case—was likewise manifestly erroneous. Section 1503 of the EWSAA is unambiguous. It authorized the President to "make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961 or *any other provision of law* that applies to countries that have supported terrorism." Pub. L. No. 108-11, § 1503 (emphasis added). This is exactly what the President did in Determination 2003-23, in which he made inapplicable with respect to Iraq "any * * * provision of law that applies to countries that have supported terrorism." 68 Fed. Reg. 26,459. As he stated, former Section 1605(a)(7) was among the provisions of law he made inapplicable to Iraq, thereby restoring Iraq's sovereign immunity in cases like this. *See* Message to the Congress, 39 Weekly Comp. Pres.

Doc. 21, at 647-48 (May 22, 2003). That action was squarely within the President's EWSAA authority because Section 1605(a)(7) was a "provision of law" that applied *only* to "countries that have supported terrorism."

Instead of giving effect to the broad language of Section 1503 and the President's implementation of his statutory authority, the *Acree* majority read limits into the President's authority that appear nowhere in the statute. First, applying the *ejusdem generis* canon of construction, the majority concluded that the EWSAA only authorized the President to make inapplicable with respect to Iraq "those provisions of law that impose economic sanctions on Iraq or that present legal obstacles to the provision of assistance to the Iraqi Government," which purportedly did not include Section 1605(a)(7). 370 F.3d at 55.[10] Second, the majority relied on the absence of any reference to the FSIA or federal court jurisdiction in the EWSAA legislative history—which the majority itself admitted was "sparse" and "not conclusive"—to conclude that "the general reference in § 1503 to 'other provisions of law that apply to countries that have supported terrorism' embraces only those provisions of law that constitute legal restrictions on assistance to and trade with Iraq." *Id.* at 55, 56.

Then-Judge Roberts cogently explained the majority's key errors. He noted that the expansive language of the EWSAA should be accorded "'broad,

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[10] In fact, Section 1605(a)(7) readily falls within the majority's own characterization of laws covered by Section 1503 of the EWSAA, since Section 1605(a)(7) was a form of sanction imposed on nations that sponsored terrorism.

sweeping application,'" particularly given that Congress had recently passed a similar appropriations statute with a narrower scope, thus showing that "Congress knows how to use more limited language * * * when it wants to." *Id.* at 60 (citation omitted). He also noted that the majority erred in relying on the *absence* of specific references in the legislative history to limit the reach of the statute, stating that "the party seeking to narrow the application of the statute must demonstrate that Congress intended something less than what the law on its face says." *Id.* at 62 (citations omitted). Because the legislative history gives no indication "that Congress did *not* intend to include Section 1605(a)(7) of the FSIA among the 'any other' provisions that the President could render inapplicable to Iraq," Judge Roberts correctly concluded "that the President was authorized to—and did, with the Presidential Determination—oust the federal courts of jurisdiction over Iraq in Section 1605(a)(7) cases." *Id.* at 63.

The *Acree* panel also erred in suggesting, in dicta, that its decision was supported by the limited duration of the President's EWSAA authority to act. 370 F.3d at 56-57. Section 1503 provides that the "*authorities* contained in this section shall expire" if not renewed. Pub. L. No. 108-11, § 1503 (emphasis added). It does not provide that the effect of the President's *actions* would expire where, as here, those actions were taken when the statutory authority was in effect. That is the Executive's understanding, *see Beaty* U.S. Amicus Br. 12-14, and it is correct. The President's 2003 Determination rendering Section 1605(a)(7) inappli-

cable to Iraq was clearly authorized by an existing statute and was thus fully effective.[11]

Nor is it "perplexing," *Acree*, 370 F.3d at 56, that Congress would authorize the President to restore Iraq's immunity for acts done while designated as a state sponsor of terrorism, while Section 1605(a)(7) denies immunity in such situations for other nations. As Judge Roberts explained, "[g]iven the broad language of the EWSAA and the circumstances surrounding its enactment, it is entirely possible—and surely not 'perplexing'—that Congress in 2003 made an *ad hoc* decision to strike a different balance in favor of the new government of Iraq." *Id.* at 61. Indeed, Congress made the same determination in the recent NDAA after the President objected to a lack of any exception for Iraq. The law as enacted imposes onerous provisions on state sponsors of terrorism while expressly authorizing the President to waive those provisions, including the new jurisdictional exception to sovereign immunity in 28 U.S.C. § 1605A(a)(1), as to Iraq.[12]

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[11] The meaning of the EWSAA sunset provision was never briefed by either party in *Acree*.

[12] Section 1083(c)(4) of the NDAA, which purported to state a later Congress' view about Section 1503 of the EWSAA, does not change this result. Because the President *waived* Section 1083(c)(4) as to Iraq pursuant to authority Congress granted him, that provision can have no legal effect on this case. In any event, an attempt by later legislators to ascribe intent to a previous, differently-constituted Congress, even if codified, cannot override the plain language of the statute as an expression of the intent of the Congress that passed it. *See Rainwater* v. *United States*, 356 U.S. 590, 593 (1958); *Mackey* v. *Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 839-40 (1988).

As Judge Roberts concluded in *Acree*, the D.C. Circuit's EWSAA holding contravenes this Court's precedents. Where, as in Section 1503, a statute uses the expansive term "any," the Court has consistently given that word the broadest possible sweep. *See, e.g., United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) ("[T]he word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'"); *United States* v. *Monsanto*, 491 U.S. 600, 609 (1989) ("The statutory provision at issue here is broad and unambiguous, and Congress' failure to supplement [the statute's] comprehensive phrase—'any property'—with an exclamatory 'and we even mean assets to be used to pay an attorney' does not lessen the force of the statute's plain language."); *see also United States* v. *Ballistrea*, 101 F.3d 827, 836 (2d Cir. 1996) ("'[I]t is unnecessary to go beyond the plain language of the statute. 'Any means any.'") (citations omitted).

This Court construed a similar provision in *Ali* v. *Federal Bureau of Prisons*, 128 S. Ct. 831, 835 (2008), which involved a statute conferring sovereign immunity of the United States for claims arising from the detention of property by "any officer of customs or excise or *any other law enforcement officer*." *Id.* (*citing* 28 U.S.C. 2680(c)) (emphasis added). The Court held that the provision included Bureau of Prisons officers because "[t]he phrase '*any* other law enforcement officer' suggests a broad meaning." *Id.* (emphasis in original). "Congress' use of 'any' to modify 'other law enforcement officer' is most naturally read to mean law enforcement officers of whatever kind." *Id.* at 836. Likewise, Congress' use

of the term "any" to modify "other provision of law" must mean all kinds of provisions of law.

As Judge Roberts noted, 370 F.3d at 62, the D.C. Circuit's decision in *Acree* also runs counter to this Court's decision in *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578, 587 (1980), which refused to construe the statutory term "any other final action" to encompass only actions that were "similar to the actions under the specifically enumerated provisions that precede that catchall phrase in the statute." The Court "discern[ed] no uncertainty in the meaning of the phrase, 'any other final action.'" *Id.* at 588. Accordingly, it held that, in the absence of contrary legislative history, that phrase "must be construed to mean exactly what it says, namely, *any other* final action." *Id.* at 589 (emphasis in original). Moreover, the Court also rejected the argument, based on "scant" legislative history, that Congress could not have intended to affect the jurisdiction of the courts without discussion of the matter, holding that "[i]n ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark." *Id.* at 592. *See Acree*, 370 F.3d at 63 (Roberts, J.).

The D.C. Circuit in *Acree* did what *Harrison* and *Ali* say it should not. It held that the broad statutory phrase "any other provision of law" is to be read narrowly to encompass only "legal restrictions on assistance and funding for the new Iraqi Government," 370 F.3d at 57, based on the nature of the one law specifically listed in Section 1503 and the fact that the "sparse" and "inconclusive" legislative history did not specifically refer to federal court jurisdiction or the FSIA. The court should

have given effect to the words of the statute rather than rewriting it. *See PGA Tour, Inc.* v. *Martin*, 532 U.S. 661, 689 (2001) ("[T]he fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.") (citation omitted).

Moreover, the D.C. Circuit's decision cannot be squared with this Court's holdings that the President has inherent authority—even *without* express statutory authorization—to compromise the claims of U.S. nationals to further foreign policy interests. *See Amer. Ins. Ass'n.* v. *Garamendi*, 539 U.S. 396, 414 (2003); *Dames & Moore* v. *Regan*, 453 U.S. 654, 679-80 (1981). This case squarely implicates a critically important foreign policy interest of the United States: this country's support for and relations with the new democratic government of Iraq. Under the cited cases, the President possesses the inherent authority to nullify the claims at issue in order to further that foreign policy. The President must necessarily have possessed the lesser ability to withdraw a judicial forum while still preserving the claims for diplomatic negotiation, given that Congress expressly authorized him to make inapplicable any law that was based on Iraq's former status as a state sponsor of terrorism.

Even the *Acree* majority found the issue an "exceedingly close question," 370 F.3d at 51, and its analysis has been rejected by two judges (then-Judge Roberts in *Acree* and Judge Bates in *Beaty*) and apparently questioned by two others (Judges Kavanaugh and Brown, who dissented from the denial of *en banc* reconsideration). A decision of

such debatable merits and unquestionable importance warrants this Court's review.

CONCLUSION

For the reasons set forth above, the writ of certiorari should be granted.

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